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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PRISCILLA M. FRENCH,

NO. CIV. S-01-1070 WBS JFM

Plaintiff,

v.

MEMORANDUM AND ORDER

MARRIOTT INTERNATIONAL, INC.,
MARRIOTT MAPLE RIDGE, and DOES
1 through 100, inclusive,

Defendants.

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In this diversity case, plaintiff Priscilla French sues her former employer, defendants Marriott International, Inc. and Marriott Senior Living Services Inc. (incorrectly sued as Marriott Maple Ridge), for defamation. Defendants now move for summary judgment on plaintiff's defamation claim, or, in the alternative, for summary adjudication on plaintiff's claim for punitive damages.

I. Factual Background

On February 1, 1999, plaintiff was hired by defendants to work as a Director of Sales at defendants' Marriott Maple Ridge facility in Laguna, California ("Maple Ridge"). (Pl's

1 Decl. ¶ 1.) Maple Ridge provides assisted living and special
2 care services for the elderly. (Pl's Dep. at 182.)

3 Plaintiff's supervisor at Maple Ridge and the General
4 Manager of the facility was Barbara Favila. (Favila Decl. ¶ 1.)
5 According to plaintiff, during the course of her employment at
6 Maple Ridge, she was "drawn into a number of disputes and
7 quarrels with . . . Favila as a result of [her] hypercritical and
8 caustic nature." (Pl's Decl. ¶ 2.) These disputes allegedly
9 included: (1) an incident in which plaintiff expressed to Favila
10 her dissatisfaction with Favila's "demoralizing tactics," and was
11 told by Favila that "I am going to run this ship my way;"
12 thereafter, plaintiff was allegedly "shunn[ed]" by Favila, who
13 "refused to communicate with [plaintiff] unless it was absolutely
14 essential for business purposes" (Pl's Decl. ¶ 2; Pl's Dep. at
15 101-105.); and (2) an occasion on which plaintiff informed Favila
16 of her tentative plans leave Marriott to prepare for her upcoming
17 wedding; Favila allegedly became "overjoyed" at the prospect, and
18 then "publicly criticized" plaintiff when plaintiff decided not
19 to quit. (Pl's Decl. ¶ 4.)

20 In April of 2000, Favila claimed to have discovered
21 discrepancies in paperwork plaintiff submitted in connection with
22 a bonus program called "Sweat the Small Stuff," which eventually
23 led to plaintiff's termination from Marriot. The bonus program
24 offered cash incentives to sales personnel based on the number of
25 reservations and move-ins they lodged during a given time period.
26 (Pl's Dep. Ex. M.) Plaintiff received and reviewed an internal
27 office memorandum describing the bonus program in February of
28 2000. (Pl's Dep. at 178, 179.) The memo states:

1 At the end of each period, submit your Sweat the Small
2 Stuff Sales Incentive Form attached to the: MMR
3 Appropriateness Form for new reservations or a copy of
4 the first period's rent check for any new move-in. You
5 [sic] general manager will verify the information, sign
6 the incentive form and process it for payment. The
7 sales associate will also forward the signed copy to
8 your Area Sales Director, if requested.

9 (Id.) (emphasis in original.) The Sales Incentive Form is a table
10 for a sales associate to fill out indicating the number of
11 reservations or move-ins made during a given time period. (Id.)
12 The Appropriateness Form is a form designed to determine whether
13 a prospective resident is suitable for Maple Ridge in terms of
14 medical or nursing care or other services the applicant is likely
15 to need.

16 On April 21, 2000, plaintiff gave a Sweat the Small
17 Stuff sales incentive form to Favila. (Pl's Dep. at 179-180.)
18 Plaintiff's incentive form indicated a total of fourteen
19 reservations and one move-in for "period 4" of the bonus program,
20 the period between March 25, 2000 and April 21, 2000. (Id. at
21 181-186.) Plaintiff did not attach any Appropriateness Forms or
22 rent checks for the reservations and move-in to the incentive
23 form. (Id. at 190.) Favila returned the incentive form to
24 plaintiff along with a post-it note stating that "the highlighted
25 attachments are required for processing," and requesting
26 plaintiff to resubmit the incentive form "w/ appropriate
27 documents." (Id. at 190-192, Ex. I; Favila Decl. Ex. B.)¹

28 According to plaintiff, she went to Les Vostry-Ritter,
the Assistant General Manager who maintained financial records at

¹ Favila and plaintiff offer conflicting testimony regarding what, if anything, was highlighted.

1 the facility, and asked his permission to review the reservation
2 and move-in deposit checks for period 4. (Pl's Decl. ¶ 9.)
3 Plaintiff alleges that using these checks, she compiled a
4 handwritten list of the names of thirteen people who had made
5 reservations during period 4 and the dates of their checks. (Id.
6 ¶ 10; Pl's Dep. at 206, 216 Ex. J.)

7 On April 29, 2000, plaintiff returned the incentive
8 form to Favila along with the handwritten list, but did not
9 attach any of the period 4 rent checks. (Id. at 206-08, 216.)
10 According to plaintiff, she attached a post-it note to the
11 documents she gave Favila saying "Barb, is this right?" (Id. at
12 207.) Later that day, plaintiff also gave Favila an "inquiry
13 status report" on which she appears to have indicated whether
14 assessment forms had been completed or deemed not necessary for
15 various period 4 reservations. (Pl's Decl. ¶¶ 10, 11, Ex. N;
16 Pl's Dep. at 207-212.)

17 Favila reviewed plaintiff's documentation, and claims
18 to have found several discrepancies with her own records, which
19 consisted of a reservation log and her own incentive form.
20 (Favila Decl. ¶ 5; Favila Dep. at 78-80, Ex. L, T.) For
21 instance, plaintiff's handwritten list stated that she had made a
22 reservation for Dorothy Kinney during period 4, but Favila's
23 reservation log reflected that Ms. Kinney's reservation had been
24 canceled on April 4, 2000, more than two weeks before the end of
25 period 4. (Pl's Dep. at 220-222, Ex. L.) Plaintiff explained at
26 her deposition that she confused Ms. Kinney with Lillian Snyder,
27 another woman for whom she had made a reservation during period 4
28 but whose name she did not include on her handwritten list. (Id.

1 at 222, Ex. J.) Favila testified at her deposition that Lillian
2 Snyder should have been counted as a reservation during period 4.
3 (Favila Dep. at 73, Ex. L.)

4 Plaintiff also indicated on her handwritten list that a
5 reservation had been made for Art Reber during period 4, but
6 Favila's reservation log reflected that his reservation had been
7 made during period 3. (Pl's Dep. at 226-28; Ex. J, L.)

8 Plaintiff testified at her deposition that Mr. Reber's period 3
9 reservation was denied by Favila because of his problems with
10 alcoholism. According to plaintiff, Mr. Reber's family lobbied
11 Maple Ridge to reinstate his reservation, which Maple Ridge
12 allegedly did in period 4. (Pl's Dep. at 227-28.) A reservation
13 agreement for Mr. Reber was signed by Favila on April 12, 2002,
14 several days into period 4. (Whelan Decl. Ex. B.)

15 Plaintiff also listed Fanny Mirsky as a new reservation
16 for period 4. On April 29, 2000, eight days after the close of
17 period 4, plaintiff learned that Ms. Mirsky had died. (Pl's Dep.
18 at 223-225.) Because period 4 ended on April 21, 2000, and
19 because nothing in the company's records indicated that Ms.
20 Mirsky died during period 4, Favila acknowledged in her
21 deposition that Ms. Mirsky should have been counted as a new
22 reservation for period 4. (Favila Dep. at 80-82.) Nevertheless,
23 Favila failed to count Ms. Merski as a new reservation on her own
24 incentive form, which she used to double-check plaintiff's
25 submissions. (Id., Ex. T.)

26 Another reservation listed on plaintiff's handwritten
27 list that was inconsistent with Favila's incentive form was a
28 reservation for Robert Klein. Favila's incentive form reflects

1 that no reservation was made for Mr. Klein during period 4.
2 (Favila Dep. at 80, Ex. T.) Favila's reservation log sheet,
3 however, states that a reservation was indeed made for Mr. Klein
4 in period 4. (Id., Ex. L) According to the log sheet, Mr.
5 Klein's reservation was refunded on June 16, 2000, long after the
6 close of period 4. At her deposition, Favila acknowledged that
7 her log sheet was inconsistent with her incentive form. (Id. at
8 Ex. 80.)

9 Based on the discrepancies she perceived between
10 plaintiff's documentation and her own records, Favila consulted
11 her supervisor at Maple Ridge, Mike Eden. (Id.; Favila Decl. ¶
12 6.) Eden told Favila to discuss the situation with Ron Rose,
13 the regional human resources manager. (Favila Dep. at 37.)
14 Favila told Rose that plaintiff had submitted an incentive form
15 without appropriate documentation and with numbers that Favila
16 felt were unsupported. (Id. at 40.) Rose told Favila that based
17 on this information, it appeared that plaintiff had willfully
18 falsified company records, which was grounds for termination.
19 (Id. at 36-40.)

20 On May 4, 2002, Favila, the assistant general manager
21 Les Vostry-Ritter, and the area sales director Lisa Wilkes, met
22 with plaintiff behind closed doors in plaintiff's office. (Id. ¶
23 7.) Favila informed plaintiff that she was being terminated
24 because she falsified documents in the Sweat the Small Stuff
25 contest. (Pl's Dep. at 231-237; Pl's Decl. ¶ 15.)

26 Plaintiff's termination notice stated that plaintiff
27 was terminated for "willful falsification of company records."
28 (Favila Decl., Ex. C.) Plaintiff alleges that after her

1 termination meeting, the statement that plaintiff was terminated
2 for willfully falsifying company records was published by
3 defendants to (1) Catherine Holzer, a human resources worker at
4 defendants' corporate office; (2) the Frick Company, which
5 administers defendants' unemployment claim program; and (3) a
6 prospective employer with whom plaintiff interviewed. (Favila
7 Dep. at 63; Pl's Decl. ¶ 30; Johnson Decl. ¶ 2.) Plaintiff also
8 contends that she was compelled to repeat this statement to her
9 fiancée, a friend, her two daughters, and defendants' area
10 manager Mike Eden. (Pl's Decl. ¶¶ 19, 24, 31; Jue Decl. Ex. C.)

11 II. Discussion

12 The court must grant summary judgment to a moving party
13 "if the pleadings, depositions, answers to interrogatories, and
14 admissions on file, together with the affidavits, if any, show
15 that there is no genuine issue as to any material fact and that
16 the moving party is entitled to judgment as a matter of law."
17 Fed. R. Civ. P. 56(c). The party adverse to a motion for summary
18 judgment may not simply deny generally the pleadings of the
19 movant; the adverse party must designate "specific facts showing
20 that there is a genuine issue for trial." Fed. R. Civ. P. 56(e);
21 see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put,
22 "a summary judgment motion cannot be defeated by relying solely
23 on conclusory allegations unsupported by factual data." Taylor
24 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving
25 party must show more than a mere "metaphysical doubt" as to the
26 material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475
27 U.S. 574, 587 (1986).

28 Plaintiff's sole cause of action against defendants is

1 a state law claim for defamation. In order to establish a claim
2 for defamation, the plaintiff must show that a defamatory and
3 unprivileged statement concerning the plaintiff was published to
4 a person other than the plaintiff who understood its defamatory
5 meaning. See 5 Witkin Summary of California Law § 476 (9th ed.
6 2001.) A false accusation that an employee falsified company
7 records is defamatory per se. Kelly v. General Telephone Co.,
8 136 Cal. App. 3d 278, 284 (1982). Defendants argue that summary
9 judgment is appropriate because (1) there was no publication of
10 the defamatory statement; (2) the statement was not false; (3)
11 the publications were privileged; and (4) plaintiff was not
12 compelled to self-publish.² In the alternative, defendants move
13 for summary adjudication that plaintiff is not entitled to
14 recover punitive damages.

15 A. Publication

16 Plaintiff alleges that the defamatory statement at
17 issue was published numerous times by various agents employed by
18 defendants. Defendants contend that "there are no triable issues
19 of material fact establishing the required element of
20 'publication'." (See Def's Mem. of P & A at 1.) Although the
21 substance of this argument is not entirely clear, defendants
22 appear to argue that plaintiff has only speculated about who said
23 what to whom, without pointing to any specific communications.
24 (See Def's Reply at 8.) The factual record, however, is at least
25 clear enough to create a triable issue of fact that the remark to

26
27 ² Defendants do not dispute that the alleged defamatory
28 statements concerned plaintiff, or that the persons to whom the
statements were published understood the statements to have a
defamatory meaning.

1 the effect that plaintiff falsified documents was published by
2 Favila to the persons present at plaintiff's termination meeting,
3 and to Catherine Holzer, who received plaintiff's termination
4 notice for filing after plaintiff was fired.

5 B. Truth of the Statement

6 Truth is a complete defense to defamation. Washer v.
7 Bank of America, 87 Cal. App. 2d 501, 509 (1948). Defendants
8 argue that plaintiff's defamation claim must fail because the
9 statement that she was fired for willfully falsifying company
10 records is true. While plaintiff was in fact fired for willfully
11 falsifying company records, this does not vitiate plaintiff's
12 claim for defamation. As the court explained in Jackson v.
13 Paramount Pictures Corp, "[i]f A says B is a thief, and C
14 publishes the statement that A said B was a thief, in a certain
15 sense this would be the truth, but not in the sense that the law
16 means. . . . [I]t would be but a repetition by [C] of a
17 slanderous charge. His defense must consist in showing that in
18 fact B is a thief." 68 Cal. App. 4th 10, 26-27 (1998) (quoting
19 Gilman v. McClatchy, 111 Cal. 606, 612 (1896)); see also Ray v.
20 Citizen-News Co., 14 Cal. App. 2d 6, 8-9 (19836); Arditto v.
21 Putnam, 214 Cal. App. 2d 633, 639 n.2 (1963). Thus, defendants
22 must show that the defamatory charge itself - that plaintiff
23 willfully falsified company records, rather than the fact that
24 she was terminated for falsifying records - is true. See Lipman
25 v. Brisbane Elementary Sch. Dist., 55 Cal. 2d 224, 233
26 (1961) (defendants bear the burden of proving truth in defamation
27 cases involving private figures and matters of private concern).

28 Disputed issues of fact exist as to whether plaintiff

1 willfully falsified company records. A dispute also exists as to
2 whether there was in fact an error in plaintiff's submissions. A
3 reasonable jury could find that there was nothing erroneous about
4 plaintiff's submissions, and that accordingly there was no truth
5 to the statement that plaintiff falsified the documents in the
6 contest.

7 C. Common Interest Privilege

8 Defendants argue that they are shielded from liability
9 by the common interest privilege of California Civil Code 47(c).
10 Section 47(c) provides that a communication is privileged if it
11 is made "without malice, to a person interested therein, by one
12 who is also interested." Cal. Civ. Code § 47(c). Defendants
13 bear the initial burden of establishing that the alleged
14 defamatory statement concerns a common interest of the speaker
15 and listener and thereby falls within the scope of the privilege.
16 Lundquist v. Reusser, 7 Cal. 4th 1193, 1208 (1994). If
17 defendants establish that the statement concerns a common
18 interest, it becomes plaintiff's burden to prove that the
19 statement was made with malice. Id.

20 It is undisputed that the alleged defamatory remark was
21 published by defendants only to other employees within the
22 corporation, and to the Frick Co., the administrator of
23 defendants' unemployment insurance. These persons all shared a
24 common interest in the substance of the alleged defamatory
25 remark. See Cuenca v. Safeway San Francisco Employees Federal
26 Credit Union, 180 Cal. App. 3d 985, 995 (1986) ("Communications
27 made in a commercial setting relating to the conduct of an
28 employee have been held to fall squarely within the qualified

1 privilege); Kelly v. General Telephone Co., 136 Cal. App. 3d 278,
2 284 (1982) ("an employer is not liable for defamation if one of
3 its employees advises other employees, such as personnel
4 officers, of a suspicion that a former employee falsified
5 records, as long as the communication is not motivated by
6 malice").

7 However, the privilege of section 47(c) will not shield
8 defendants from liability if the statement at issue was made with
9 malice. Malice is "a state of mind arising from hatred or ill
10 will, evidencing a willingness to vex, annoy, or injure another
11 person." Lundquist, 7 Cal. 4th at 1204 (quoting Brown v. Kelly
12 Broadcasting Corp., 48 Cal.3d 711, 723 (1989)). Malice can be
13 shown by demonstrating, inter alia, that (1) the defendant
14 "lacked reasonable grounds to believe the statement was true and
15 therefore acted with reckless disregard for [the] plaintiff's
16 rights"; or (2) the publication was motivated by hatred or ill
17 will toward the plaintiff. Cuenca, 180 Cal. App. 3d at 997;
18 Agarwal v. Johnson, 25 Cal. 3d 932, 944 (1979).

19 Where the analysis ultimately turns of questions as to
20 state of mind, summary judgment is generally inappropriate.
21 Mendocino Env'tl. Ctr. v. Mendocino County, 192 F.3d 1283, 1302
22 (9th Cir. 1999). In this case, there are disputed issues of
23 material fact regarding whether the statements were made with
24 malice. Accordingly, defendants are not entitled to summary
25 judgment on plaintiff's defamation claim.

26 Because the court finds that a triable issue of fact
27 exists as to whether the statements were made with malice, the
28 court does not need to address whether publications made by the

1 plaintiff herself are privileged under section 47(c), or whether
2 plaintiff was compelled to self-publish the defamatory statement.
3 Summary judgment must be denied in any case.

4 D. Punitive Damages

5 Defendants move, in the alternative, for summary
6 adjudication on the question of whether plaintiff is entitled to
7 recover punitive damages. To recover punitive damages,
8 plaintiff must prove by clear and convincing evidence that
9 defendants are guilty of "oppression, fraud, or malice." Cal.
10 Civ. Code § 3294(a). Where, as here, the defendant is a
11 corporation, punitive damages cannot be awarded unless the
12 offending conduct is either performed or ratified by an officer,
13 director, or managing agent of the corporation. Id. § 394(b).

14 It is undisputed that none of the people who published
15 or heard the defamatory statement at issue were officers or
16 directors of defendants' corporation. A "managing agent" for
17 purposes of section 3294(b) includes "only those corporate
18 employees who exercise substantial independent authority and
19 judgment in their corporate decisionmaking such that their
20 decisions ultimately determine corporate policy." White v.
21 Ultramar, Inc., 21 Cal 4th 563, 573 (1999).

22 The employees of defendants who allegedly published or
23 heard the defamatory remark (and were therefore in a position to
24 ratify it) are: (1) Mike Eden, the area manager responsible for
25 managing 8-10 facilities; (2) Barbara Favila, the general manager
26 of Maple Ridge facility where plaintiff worked; (3) Les Vostry-
27 Ritter, the assistant general manager of the facility; (4) Ron
28 Rose, Marriott's regional human resources manager; (5) Lisa

1 Wilkes, the area sales director for Marriott; and (6) Catherine
2 Holzer, an employee at Marriott's corporate office. Marriott is
3 a multi-national corporation with thousands of hotels and
4 facilities worldwide. The highest ranking Marriott employee
5 allegedly involved in this case was Mike Eden, an area manager
6 responsible for 8-10 facilities. Defendants have submitted
7 declarations stating that none of the employees involved in this
8 case had any input into overall corporate policy. (See Favila
9 Decl. ¶¶ 1,3.)³

10 Plaintiff suggests that because Favila had influence
11 over the decision to fire plaintiff, she should be considered a
12 managing agent. (See Pl's Response to Def's Sep. Statement of
13 Undisputed Facts ¶ 26 ("Marriott terminated Plaintiff on Favila's
14 request and direction with no real investigation. She had
15 unlimited power to create and modify policy").) However, it is
16 well established that the mere ability to hire and fire employees
17 does not render a supervisory employee a managing agent. Id.
18 Rather, the employee must have authority to establish or change
19 the corporation's basic policies. Id. at 574. Plaintiff has
20 come forward with no evidence to suggest that Favila or any of
21 the other people who published or heard the defamatory statement
22 at issue had this kind of authority.

23 ///

24 ///

25
26 ³ Plaintiff complains that these declarations state the
27 improper legal conclusion that the above-mentioned employees have
28 no input into corporate policy. The legal conclusion to be
reached, however, is whether these employees are "managing
agents."

1 IT IS THEREFORE ORDERED that defendants' motion for
2 summary judgment be, and the same hereby is, DENIED, and
3 defendants' motion for summary adjudication that plaintiff is not
4 entitled to recover punitive damages be, and the same hereby is,
5 GRANTED.

6 DATED: July 31, 2002

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8 WILLIAM B. SHUBB
9 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
August 1, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-01070

French

v.

Marriott Intl Inc

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on August 1, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY:


Deputy Clerk